BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ELIZABETH J. SLAPE Claimant VS. **ARBYS** Respondent AND **XL SPECIALTY INSURANCE CO.** Insurance Carrier	)	Docket No. 1,036,610

ORDER

STATEMENT OF THE CASE

Claimant requested review of the September 16, 2008, preliminary hearing Order entered by Administrative Law Judge Thomas Klein. William L. Phalen, of Pittsburg, Kansas, appeared for claimant. Matthew J. Schaefer, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that claimant did not meet her burden to establish a work-related accident and denied her request for medical treatment and past medical expense reimbursement.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the September 3, 2008, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.[1]

[1] A transcript of the discovery deposition of claimant taken November 1, 2007, was filed with the ALJ. There is no stipulation in the ALJ's file that the discovery deposition could be considered as evidence. Therefore, the discovery deposition is not part of the record and was not considered by this Board Member in this appeal.

ISSUES

Claimant argues she has met her burden of proving that she suffered injuries from a series of accidents that arose out of and in the course of her employment with respondent and that she provided timely notice of her accidents.

Respondent argues that claimant failed to comply with the notice requirement under the Workers Compensation Act. Respondent further contends that claimant failed to sustain her burden of proving that she sustained an accidental injury that arose out of and in the course of her employment with respondent.

The issues for the Board's review are:

(1) Did claimant suffer an accidental injury or injuries that arose out of and in the course of her employment with respondent?

(2) If so, did claimant provide respondent with timely notice of her work-related injury or injuries?

FINDINGS OF FACT

Claimant was hired by respondent to work as a cashier on June 4, 2007, and began working shortly after that date. As well as working as a cashier, her duties included cooking, prep work, stocking, and mopping. She testified that she was required to lift boxes of frozen food that "felt like they were 50 pounds."[2] Kelly Kyser, respondent's assistant manager, testified that shipping orders show that the boxes of food claimant testified she lifted weighed 30 pounds. She admitted she did not weigh the boxes themselves but relied on the shipping orders.

Claimant testified that she complained to the manager, James Lomax, telling him that her work was causing her physical difficulties. She testified that she first talked to Mr. Lomax about her condition about a week after she started work and continued to complain almost every day she worked. She asked Mr. Lomax to provide her with help and, although he told her he would have someone help her, no one did.

Claimant had previous problems with her neck and mid-back and had restrictions. She also had previous left shoulder surgery and left knee surgery. She testified she was able to work with those conditions but began to have difficulties after starting work at respondent, and her symptoms worsened as she continued to work there.

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[2] P.H. Trans. at 8.

Claimant's last day worked at respondent was July 17, 2007. On that day, she and Mr. Lomax had a confrontation. On July 18, 2007, she returned some of respondent's items and quit. At no time before she quit did she ask respondent to provide her with medical treatment. She is alleging injuries to her neck, mid-back and left shoulder. She has symptoms of pain, numbness and tingling.

On July 17, 2007, claimant was seen at the office of Dr. Tiruchengod Venkatachalapathi by Dawn McCaffery, a nurse practitioner. Claimant was complaining of headaches and nasal and sinus congestion. Claimant testified that she told Ms. McCaffery about her how her job was hurting her and Ms. McCaffery suggested she quit her job. Claimant admits, however, that this conversation was not recorded in the medical records of July 17. She also saw Nurse McCaffery on July 18, 2007, at which time her chief complaint was exposure to mold. Claimant was again seen by Nurse McCaffery on August 8, 2007, complaining of chronic pain, neck pain, headache, and whole body pain, as well as a chronic sinus infection and sinus pain. She was diagnosed with chronic pain, whole body pain, chronic allergies, chronic right sinus problems, and new onset of right exophthalmus. Dr. Venkatachalapathi ordered a CT scan of claimant's head and sinuses regarding her diagnosis of right exophthalmus and sinus problems and a MRI of her cervical spine regarding her diagnosis of severe neck pain and bilateral arm pain.

Claimant saw Dr. Venkatachalapathi on August 20, 2007, complaining that she continued to have lower back pain. X-rays taken of her neck showed that she had cervical degenerative disk disease. He also diagnosed her with low back pain and ordered an MRI of the lumbar spine. At no time did claimant report to Dr. Venkatachalapathi's office that her problems were caused by her work at respondent.

Claimant was seen by Nurse Judy Shedd at ED Triage Adult JP on August 31, 2007. Claimant's chief complaint was back pain with arms and legs going numb for over a month. She reported an old back injury. The triage report noted that claimant had a "History of Fall in last 3 months, Impaired gait."[3] That report does not mention a history of injury while working at respondent.

Claimant was seen by Dr. Edward Prostic on October 15, 2007, at the request of claimant's attorney. She complained to Dr. Prostic that she suffered injury from repetitious lifting of boxes weighing 50 pounds at work. She claimed injuries to her low back and an aggravation of other areas of her spine. She also complained of pain and stiffness in her neck, numbness and tingling in her hands, and spasms that affect her entire body. Dr. Prostic opined that claimant sustained repetitious minor trauma during the course of her employment with respondent.

[3] P.H. Trans., Cl. Ex. 4 at 1.

Claimant testified that she has done nothing since leaving her employment at respondent to make her condition worse. She has subsequently worked part time as a dietary aide. She currently works full time for a janitorial service and cleans bathrooms, offices and break rooms.

Claimant filed an Application for Hearing with the Division of Workers Compensation on September 17, 2007, alleging injuries to her "[n]eck, left shoulder, back and all other parts of the body" as a result of a series of accidents "[e]ach and every working day ending 07/18/07" while "[p]erforming the job duties of a [c]ashier, [c]ook, and [s]tocker" for respondent.[4]

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[5] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[6]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[7]

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

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[4] Form K-WC E-1, Application for Hearing (filed Sept. 17, 2007).

[5] K.S.A. 2007 Supp. 44-501(a).

[6] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[7] *Id.* at 278.

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[8] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[9] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[10]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[11] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[12]

ANALYSIS

Claimant testified that her work with respondent aggravated her preexisting head, neck, back and left shoulder problems. Dr. Prostic agreed that claimant suffered repetitious minor traumas during her employment with respondent and that she sustained injuries to her spine and peripheral nerve entrapment. Although there is no mention of a work injury in the contemporaneous records of Dr. Venkatachalapathi or Nurse McCaffery, claimant has proven she suffered at least a temporary aggravation of her preexisting back and upper extremity conditions as a result of performing her work for respondent. There is no contrary testimony.

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[8] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[9] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[10] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

[11] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[12] K.S.A. 2007 Supp. 44-555c(k).

The ALJ did not address the issue of notice.[13] Therefore, this Board Member will not address that issue on appeal. Rather, this matter should be remanded to the ALJ for a determination of the notice issue and, if resolved in claimant's favor, then the ALJ should address claimant's request for preliminary benefits.[14]

CONCLUSION

(1) Based upon the record presented to date, claimant has met her burden of proving she suffered personal injuries that arose out of and in the course of her employment with respondent by a series of accidents.

(2) The issue of whether claimant provided timely notice of accident to respondent is remanded to the ALJ.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Thomas Klein dated September 16, 2008, is reversed in part and remanded to the ALJ for a determination of the issue of timely notice and, if appropriate, claimant's request for preliminary benefits.

IT IS SO ORDERED.

Dated this _____ day of November, 2008.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

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[13] At the preliminary hearing, there was also an issue raised by respondent concerning the Notice of Intent, which it appears the ALJ likewise did not address because of his ruling on compensability. P.H. Trans. at 5-7.

[14] Given the length of time that has passed since claimant worked for respondent and her subsequent work activities with other employers, there may be a question whether claimant's current need for treatment is a direct result of her work with respondent as opposed to a subsequent aggravation or even a natural consequence of her preexisting condition if she suffered only a temporary aggravation with respondent.